PD-0710-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 1/28/2019 11:19 PM
Accepted 1/29/2019 9:21 AM
DEANA WILLIAMSON
CLERK

FILED
COURT OF CRIMINAL APPEALS
1/29/2019
DEANA WILLIAMSON, CLERK

No. PD-0710-18

In the

Court of Criminal Appeals

Of the State of Texas

JESSE GALINDO DELAFUENTE

v.

The State of Texas

Review from the Opinion of the 10th Court of Appeals

No. 10-16-00376-CR

Appeal from Cause No. 2016-419-C1

In the 19th District Court

Of McLennan County, Texas

Appellant's Brief on the Merits

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[2] David Shaw was an assistant district attorney at the time of trial. He now works for Waco City Attorney's office.
[3] Barry Johnson took office as the elected Criminal District Attorney of McLennan County on January 1, 2019.

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TO THE HONORABLE JUSTICES OF THE COURT OF CRIMINAL APPEALS OF TEXAS:

Statement Regarding Oral Argument

The Court has already ruled that oral argument will not be permitted.

Statement of the Case

Petitioner was charged with evading arrest in a motor vehicle. (*C.R.* at 6). After a jury trial, Petitioner was found guilty and sentenced to ten years in prison. (*C.R.* at 85). Petitioner timely appealed his conviction (*C.R.* at 106), alleging, *inter alia*, Michael Morton Act violations. *See Appellant's Brief to 10th Court of Appeals*, p. viii. While his appeal was pending, Petitioner was released on so called "shock probation". (*C.R. Supplemental* at 18-22). As a precautionary measure, Petitioner filed a second notice of appeal more than thirty days after the suspension of his sentence via probation. (*C.R. Supplemental* at 27). The court of appeals dismissed his appeal for want of jurisdiction because the second notice of appeal was filed more than thirty days after the order for shock probation. *Delafuente v. State*, No. 10-16-00376-CR, 2018 Tex. App. LEXIS 4765 (Tex. App.—Waco June 27, 2018) (mem. op., not designated for publication).

Grounds for Review

1. Following this Court's decisions in *Shortt v. State* and *Smith v. State*, when an appellant files a timely notice of appeal to appeal his conviction, must he file an additional notice of appeal to maintain his appeal of the conviction if the trial court later signs an order permitting "shock" probation?

Statement of Facts

The issue before the Court is a procedural one, and thus the most relevant facts are the procedural events outlined in the statement of the case above; however, Petitioner provides the following summary of the substance of the trial testimony:

Petitioner was observed operating his vehicle, which was stopped slightly beyond the white stripe at a red light. (*4 R.R.* at 28, 29). A police officer decided to conduct a stop of Petitioner's vehicle, suspecting Petitioner was intoxicated (*4 R.R.* at 29). When the light turned green, the officer pulled his vehicle behind Petitioner and attempted to get his attention by turning on his overhead lights (*4 R.R.* at 29). Approximately 36 seconds after activating his lights, the officer utilized his siren to try to get Petitioner to pull over (*4 R.R.* at 62). Petitioner continued to drive approximately 62 more seconds, bringing the total time that he drove after the officer tried to get his attention to approximately 98 seconds (*4 R.R.* at 63).[1] The maximum speed traveled by Petitioner and the officer was approximately 35 miles per hour (4 R.R. at 61). Upon arrival at his residence, Petitioner was immediately arrested, without incident, in his driveway for Evading Arrest in a Motor Vehicle.

[1] The officer also testified that the fastest that Petitioner could have possibly stopped his car to respond to lights or sirens would have consumed 10 of those 98 seconds (4 R.R. at 68).

Argument

A. Summary of Argument

> "A wizard is never late, Bilbo Baggins. Nor is he early. He arrives precisely when he means to."
>
> -The wizard Gandalf, *The Lord of the Rings: The Fellowship of the Ring*, motion picture directed by Peter Jackson (2001).

In 2018, this Court established in *Shortt v. State* that the courts of appeal do have authority to consider appeals from a trial court order granting so-called "shock" probation, and the Court further clarified in *Smith v. State* that the appeal of an order granting shock probation is separate from an appeal of the underlying judgment and has its own appellate timetable. This case gives the Court the opportunity to clarify that since an appeal of a shock-probation order is separate from an appeal of the underlying judgment of guilt, a party need not file a second notice of appeal to continue to pursue a previously-filed appeal of his judgment. Once the Court has made this clear, litigants will be able to file their notices of appeal "precisely when [they] mean to."

B. Argument on Ground for Review Number One

1. Applicable Law

A party may only appeal a certain issue if the legislature has granted permission. *Marin v. State*, 851 S.W.2d 275, 278 (Tex. Crim. App. 1993). In February of 2018 in the *Shortt* case, this Court held that a defendant may appeal

from a judicial decision granting shock probation. *Shortt v. State*, 539 S.W.3d 321, 327 (Tex. Crim. App. 2018). To properly invoke the jurisdiction of a court of appeals, a defendant must file a notice of appeal within thirty days after the sentence is imposed or suspended or after the trial court enters an appealable order. Tex. R. App. P. 26.2, *See also Olivo v. State*, 918 S.W.2d 519, 522 (Tex. Crim. App. 1996), *Smith v. State*, 559 S.W.3d 527, 531 (Tex. Crim. App. 2018). The time to invoke appellate jurisdiction generally expires with the right to file a notice of appeal. *Dodson v. State*, 988 S.W.2d 833,834 (Tex. App.—San Antonio 1999).

In September of 2018, the *Smith* case made clear that "[s]hock probation is granted through an 'Order,' not a separate or second 'judgment.'" *See Smith*, S.W.3d at 532. Indeed, this Court stated that a "trial judge has no authority to issue a new judgment and sentence some five months after adjudication." *Id.* at 533. A court must look to the substance of an order rather than its label, and thus a written judicial ruling granting shock probation is an order rather than a "judgment," and is appealable. *Id*.

An appeal from a shock-probation order is "independent of an appeal from adjudication and sentencing" and "is a separate appeal of a separate appealable order, with its own appellate timetable." *Id*. at 537. In wrapping up the *Smith* case, the Court held that an appeal of the order granting shock probation "requires a separate notice of appeal." *Id*.

Also in *Shortt*, this Court noted that the Court would one day need to deal with a situation like that in the instant case:

> Of course, construing it this way is not without its potential anomalies. For example, what if the defendant has already filed a notice of appeal, and thereby set the appellate timetable in motion, with respect to the original judgment that imposed an un-probated sentence? Does the later order granting "shock" community supervision somehow supersede the written judgment, so that a new notice of appeal must be filed which commences the appellate timetable anew? This could present a problem. … To avoid this confusion, we could hold that the appeal from the order granting "shock" community supervision is independent of the appeal from the original written judgment—a separate appeal of the order suspending the *execution* of the sentence, with its own appellate timetable, but subject to being consolidated with the appeal from the original written judgment.
>
> *Shortt*, 539 S.W.3d at 327.

2. Analysis

Our case describes the situation this Court predicted above in *Shortt.* Unfortunately, the Tenth Court of Appeals declined to follow this Court's suggestion and found that in order to continue appealing issues from his original trial, Petitioner was required to file a new notice of appeal within thirty days after the order granting shock probation. *Delafuente v. State*, No. 10-16-00376-CR, 2018 Tex. App. LEXIS 4765 (Tex. App.—Waco June 27, 2018) (mem. op., not designated for publication).

The Tenth Court of Appeals found that because the document granting shock probation was called a "judgment" rather than an "order," they need not follow this Court's guidance in *Shortt*. *Id*. The Tenth Court's reasoning falls apart in light of the

Court of Criminal Appeals' ruling in *Smith* that shock probation is granted by an appealable order, rather than a second judgment. The Tenth Court failed to follow the principal that when interpreting a court's order, other courts should consider the substance of the order rather than merely the title. *See Skinner v. State*, 484 S.W.3d 434, 437 (Tex. Crim. App. 2016).

Because the Tenth Court was wrong about the nature of the order granting shock probation, that court came to the erroneous conclusion that the shock probation order was now the operative "judgment" in the case and thus the trial court's previous judgment was moot. *Delafuente*, 2018 Tex. App. LEXIS 4765, at *2. The Tenth Court then concluded that Petitioner's previously-filed notice of appeal was moot because the judgment from which it was appealing was supposedly moot. *Id*.

Now that the law is clear that an order granting shock probation does not render the trial court's judgment moot, it is logical to find that a notice of appeal filed with the intention of appealing that original judgment is also not rendered moot. The granting of shock probation is not a reason to prevent a party from continuing with their previously-filed appeal of rulings during their trial or of the sufficiency of the evidence at trial.

This is especially true in this case where Petitioner's second notice of appeal stated: "Defendant previously filed a Notice of Appeal on November 8, 2016 and

maintained his pursuit of his appeal thereafter." (*C.R.* at 27). The second notice of appeal also noted that it was being filed "in the interest of clarity." *Id*. Petitioner knew he needed to file his first notice of appeal and did so. Petitioner continued that same appeal even while the trial court granted shock probation. Petitioner then seemed to become worried about the fact that the shock probation order was called a "judgment" and filed a second notice of appeal to try to clarify that he intended to continue his appeal. Petitioner's brief to the court of appeals does not raise any issues related to his shock probation but only raises issues that existed when his original notice of appeal was filed.

This Court has gone a long way toward clarifying issues related to shock probation appeals with the rulings in the *Shortt* case and the *Smith* case, but defendants need additional clarity on when to properly file their notices of appeal. First, the Court made clear that a party must file a notice of appeal within thirty days of an order granting shock probation in order to appeal any issues related to that order. Then, the Court held that this timeline is separate from the original appellate timetable for the original judgment.

Now, the Court can make clear that if a party doesn't intend to appeal anything related to the order granting shock probation, there is no need for a party to file a second notice of appeal. Rather, a party may continue with their appeal of the initial judgment. In the rare case where a party wants to appeal both (1) issues

related to the original judgment, and (2) separate issues related to shock probation, then that party must file a second notice of appeal and those appeals may be consolidated as the Court suggested in *Shortt*. *See Shortt*, 539 S.W.3d at 327.

Since Petitioner had already properly invoked the jurisdiction of the court of appeals by filing his first notice of appeal, the Tenth Court should have ruled on the merits of the issues raised in Petitioner's brief, rather than dismissing the appeal. Because of the court of appeals' error, Petitioner asks this Court to reverse their decision, find that the court of appeals has jurisdiction, and order the court of appeals to issue an opinion on the merits of Petitioner's appeal.

Prayer for Relief

For the reasons stated herein, Petitioner prays that this Court remand this case to the court of appeals to review Petitioner's grounds for appeal.

Respectfully submitted,

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I hereby certify that a true and correct copy of the above and foregoing document has been sent via Electronic Mail to Barry Johnson, Criminal District Attorney for McLennan County, and the Office of the State Prosecuting Attorney on January 28, 2019.

/s/ Robert G. Callahan, II
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Attorney for Petitioner

I certify that this document Appellant's Brief was prepared with Microsoft Word 2016, and that, according to that program's word-count function, the sections covered by TRAP 9.4(i)(1) contains 2,040 words.

/s/ Robert G. Callahan, II
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